IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

NATHAN MORK MILLER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 3829 Seth Norman, Judge

No. M2007-00975-CCA-R3-HC - Filed December 10, 2007

This matter is before the Court upon the State's motion to affirm the judgment of the habeas corpus court by memorandum opinion pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. The Petitioner appeals the habeas corpus court's dismissal of his petition for habeas corpus relief. Upon a review of the record in this case, we are persuaded that the habeas court was correct and that this case meets the criteria for affirmance pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Accordingly, the State's motion is granted and the judgment of the habeas court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed Pursuant to Rule 20, Rule of the Court of Criminal Appeals

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Nathan Mork Miller, Nashville, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Dan Hamm, Assistant District Attorney General; for the Appellee, State of Tennessee.

MEMORANDUM OPINION

The Petitioner is currently incarcerated serving fifty years at one-hundred percent on an agreed plea of guilty to second-degree murder. The Petitioner filed no direct appeal and abandoned his post-conviction petition before a hearing. The habeas corpus petition was subsequently filed alleging a number of claims, two of which the Petitioner maintains on appeal: (1) the Petitioner's fifty-year sentence is void because it violates the Criminal Sentencing Reform Act of 1989; and (2)

one cannot knowingly and voluntarily plead guilty to an illegal sentence. Additionally, the Petitioner now claims his sentence violates the Sixth Amendment to the United States Constitution.

The Petitioner's first argument is that his fifty-year sentence, at one-hundred percent, as a Range III offender violates the Criminal Sentencing Reform Act of 1989. We cannot agree. The Petitioner entered into a plea agreement on second-degree murder to avoid first-degree murder. Second-degree murder is a Class A felony, and fifty years is within the available range. *See* T.C.A. § 39-13-210; T.C.A. § 40-35-112(c)(1). As the Petitioner even cites, "A plea-bargained sentence may legally exceed the maximum available in the offender Range so long as the sentence does not exceed the maximum punishment authorized for the plea offense." *Hoover v. State*, 215 S.W.3d 776, 780 (Tenn. 2007). Additionally, "Offender classification and release eligibility are non-jurisdictional and legitimate bargaining tools in plea negotiations." *Bland v. Dukes*, 97 S.W.3d 133, 134 (Tenn. Crim. App. 2002); *see McConnell v. State*, 12 S.W.3d 795, 798 (Tenn. 2000). Contrary to the Petitioner's impression of recent Sixth Amendment law, these cases have not been overruled by recent cases requiring juries to find facts that result in mandatory enhancement of sentences. This was an "agreed-to sentence." The Petitioner is not entitled to relief because his sentence is not in violation of the Criminal Sentencing Act of 1989.

Because we determined the Petitioner's sentence is not illegal, his next claim must rest on whether he knowingly and voluntarily pled guilty to the legal sentence. That issue is not cognizable in a habeas corpus petition. *See Luttrell v. State*, 644 S.W.2d 408-409-10 (Tenn. Crim. App. 1982).

Finally, similar to the first issue, the Petitioner's sentence does not violate the Sixth Amendment to the United States Constitution. The recent cases hold that a trial judge cannot be the fact finder when the existence of facts are the grounds upon which mandatory enhancement is based. That is not the case here. The Petitioner pled guilty to second-degree murder in exchange for fifty years at one-hundred percent. The trial court did not make any findings of fact upon which the Petitioner's sentence was enhanced. Thus, *State v. Gomez* is not implicated. *See* — S.W.3d —, 2007 WL 2917726 (Tenn., at Nashville, June 7, 2007).

Accordingly, the State's motion is granted. The judgment of the trial court is affirmed in accordance to Rule 20, Rule of the Court of Criminal Appeals.

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ROBERT W. WEDEMEYER, JUDGE